Mirza Murtala v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–92 OF 2007

B

ZALEHA ZAHARI, ABU SAMAH AND AZHAR MA'AH JJCA

17 FEBRUARY 2010

C

Criminal Law — Dangerous Drugs Act — s 39B(1)(a), 39B(2) — Trafficking in dangerous drugs — Appeal against conviction — Whether appellant framed by police — Whether appellant had requisite intention to sell and deliver dangerous drugs — Dangerous Drugs Act 1952 s 39B(1)(a) & (2)

D

Evidence — Conflicting testimony — Approach to take

The appellant and a co-offender were charged in the High Court with trafficking in dangerous drugs under s 39B(1)(a) punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The co-offender was acquitted and discharged at the end of the prosecution's case but the appellant was convicted and sentenced to death at the end of the trial. The appellant appealed to the Court of Appeal.

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Held, dismissing the appeal:

(1) The trial judge having been presented with two differing versions of the events leading to the arrest of the appellant and his co-offender and the recovery of the dangerous drugs, had adopted the principle in *Public Prosecutor v Mohamed Ali* [1962] MLJ 257. The Court of Appeal would agree with the trial judge's approach. Further, there was no evidence whatsoever of any reason or motive by the prosecution witnesses to frame-up the appellant and the co-offender (see para 20); *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 followed.

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(2) The trial judge had made a finding of fact that the appellant had the intention to sell and deliver the dangerous drugs to the prosecution witnesses and he did in fact deliver the drugs when he brought the prosecution witnesses to the drugs later recovered from a bag slung across the co-offender. The Court of Appeal would agree with the trial judge's finding of fact and his assessment of the appellant's defence (see paras 25 & 28); *Public Prosecutor v Sa'ari Jusoh* [2007] 2 CLJ 197 (FC) referred; *Wan Marzuki Wan Abdullah v Public Prosecutor* [2008] 4 CLJ 631 referred.

I

[Bahasa Malaysia summary

Perayu dan pesalah bersama telah dituduh di Mahkamah Tinggi dengan tuduhan mengedar dadah berbahaya di bawah s 39B(1)(a) yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pesalah bersama telah dibebaskan dan dilepaskan di akhir kes pendakwaan tetapi perayu telah disabitkan dan dijatuhkan hukuman mati pada akhir perbicaraan tersebut. Perayu telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan:

(1) Hakim bicara, yang telah dikemukakan ke hadapannya dengan dua versi berbeza tentang kejadian yang membawa kepada penangkapan perayu dan pesalah bersama dan penemuan dadah berbahaya tersebut, telah menggunapakai prinsip kes *Public Prosecutor v Mohamed Ali* [1962] MLJ 257. Mahkamah Rayuan akan bersetuju dengan pendekatan hakim perbicaraan. Di samping itu, tiada apa-apa keterangan tentang apa-apa sebab atau motif oleh saksi-saksi pendakwaan untuk membuat tuduhan palsu terhadap perayu dan pesalah bersama (lihat perenggan 20); *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 diikut.

(2) Hakim bicara membuat penemuan fakta bahawa perayu berniat untuk menjual dan menghantar dadah berbahaya kepada saksi-saksi pendakwaan dan dia sememangnya telah menghantar dadah-dadah tersebut semasa dia membawa saksi-saksi pendakwaan kepada dadah tersebut yang kemudiannya dijumpai daripada beg yang digalas oleh pesalah bersama. Mahkamah Rayuan akan bersetuju dengan penemuan fakta hakim perbicaraan dan penilaiannya tentang pembelaan oleh perayu (lihat perenggan 25 & 28); *Public Prosecutor v Sa'ari Jusoh* [2007] 2 CLJ 197 (MP) dirujuk; *Wan Marzuki Wan Abdullah v Public Prosecutor* [2008] 4 CLJ 631 dirujuk.]

Notes

For cases on approach to take, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 921–926.

For cases on ss 39B(1)(a) and 39B(2), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 447–489.

Cases referred to

Emperor v Karimuddi Sheikh AIR 1932 Cal 373 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Mohamed Ali [1962] MLJ 257 (folld)
PP v Sa'ari Jusoh [2007] 2 CLJ 197, FC (refd)
Wan Marzuki Wan Abdullah v PP [2008] 4 CLJ 631, CA (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (folld)

Appeal from: Criminal Trial No 45–1 of 2002 (High Court, Ipoh)

Kerpal Singh (Jagjit Kerpal & Sakthi) for the appellant.

Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] In this case the appellant ('the first accused') and another by the name of Armiadi ('the second accused') were jointly charged in Ipoh High Court on the following charge:

> Bahawa kamu bersama-sama, pada 2.5.2001 jam lebih kurang 6.30 petang di Lengkok Bercham Timur 4, Taman Pakatan, Bercham, Ipoh di dalam Daerah Kinta di dalam Negeri Perak, telah mengedar dadah berbahaya iaitu cannabis seberat 4,934 gram, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] The High Court judge at the conclusion of the trial found the first accused guilty as per charge and upon conviction sentenced him to death whilst Armiadi was found to have successfully cast a reasonable doubt on the prosecution's case and thus was acquitted and discharged. Hence, the appeal.

THE PROSECUTION'S CASE

[3] The evidence adduced by the prosecution may be briefly summarised as follows.

[4] On 28 April 2001, Dect Sgt Zainal bin Ahmad ('SP6') received information from a source about drug trafficking activity by an Achehnese. SP6 in turn relayed this information to his superior officer, SP8, Chief Inspector Elias Abu Bakar who instructed him to carry out further investigations. Then, on 1 May 2001 at 10pm. SP6 received a telephone call from someone who identified himself as 'Agus' who informed SP6 that he had obtained SP6's telephone number from the source. 'Agus' requested SP6 to meet the source for more information. SP6 understood the information to mean that it was in relation to drug trafficking transaction. About half an hour later SP6 was again contacted by the source, who was his informer inquiring whether SP6 had been contacted by 'Agus'. SP6 was further informed by the informer that 'Agus' was prepared to sell to SP6 ganja at RM1,700 per kg. The source offered to arrange for SP6 and himself to meet 'Agus'. It was suggested that the meeting take place at a stall near a Petronas Petrol Station at Simpang

Pulai. This arrangement did not however materialise. 'Agus' once again called SP6 requesting for a meeting at a restaurant known as 'Restoran Teman Anda' ('the said restaurant') at Bandar Baru Bercham, Ipoh, in the later part of the afternoon. No specific time was fixed.

[5] Upon being informed of this development by SP6, SP8 swung into action. SP8 set up an ambush party comprising of nine police personnel. At a briefing held at SP8's office at 4pm on 2 May 2001, SP6 and Dect Sgt Busra ('SP7') were instructed to play the role of agents provocateur, while the other members of the raiding party were to effect arrest of the target. While the briefing was in progress, SP6 received another call from 'Agus' inquiring as to SP6's whereabout. SP6 informed 'Agus' that he was ready to leave and to meet him at any time. At about 5pm, SP6 and SP7 left SP8's office for Bandar Baru Bercham in a Kancil motorcar bearing registration No AEE 4192 driven by SP7. At about 5.30pm they arrived at the said restaurant and seated themselves at one of the tables. About ten minutes later SP6 saw a male person approaching the said restaurant. Suspecting that person to be 'Agus', SP6 raised his hand to catch the man's attention. The man acknowleged him by nodding his head. The man walked into the restaurant towards SP6's table. They shook hands and SP6 introduced himself as 'Zul' and SP7 as 'Isa'. The man introduced himself as 'Agus'. There were then discussions and bargaining over the price of the drug in question. Agus agreed to reduce the price to RM1,600 per kg and informed SP6 that he could only supply 5kg. After they had closed the deal Agus left the table and went outside about 25 feet away from the table to make a telephone call. Agus came inside the said restaurant again and informed SP6 and SP7 'bekalan sudah ada' and requested them to follow him to Flat Taman Pakatan, Bercham, to collect the drugs. The three of them then left for the place in SP7's car guided by Agus. On arrival at Jalan Lengkok Bercham 4, Agus pointed to a male person with a sling bag sitting and leaning against the seat of a parked motorcycle. Agus asked SP7 to stop the car about two feet away from the said motorcycle where the man with the sling bag was. They all then approached this man.

[6] SP7 then asked Agus 'mana barang?' To this question Agus responded, 'barang berada di dalam bag', pointing out to the bag slung on the male person leaning on the motorcycle. SP7 immediately unzipped the bag that was slung on this man to have sight of the goods. Inside the bag SP7 saw 'lima ketulan yang dibaluti plastik lutsinar dan kertas timah'. From the smell SP7 suspected that the package inside the bag were ganja.

[7] Immediately, SP7 scratched his head as a signal to the other members of the raiding party who had positioned themselves around the vicinity to effect arrest of the target (ie Agus) and the man leaning on the motorcycle. Upon the raiding party rushing out from their respective hiding positions, SP6 and SP7

bolted and left the scene. SP8 and other members of the arresting team managed to apprehend Agus and the man with the sling bag. On examination of the bag they found that it contained 'lima ketulan mampat dibaluti dengan plastik lutsinar dan kertas timah yang disyaki ganja'. The arrestees together with the exhibits were taken back to IPK Perak where a police report was lodged. Upon investigation it was discovered that Agus' real name was Mirza Murtala (first accused) and the person with the slung bag was Armiadi (second accused). They were both of Achehnese origin and were identified as both the accused in this case.

[8] The five packages were packed and sent to the chemist for analysis. The chemist Lam Yoke Ching ('SP5') confirmed that the five packages contained cannabis having a net weight of 4,934g.

FINDINGS OF THE TRIAL JUDGE

[9] In holding that a prima facie case had been made out against the two accused, the learned trial judge, inter alia, gave his reasons as follows:

> Kepada persoalan niat bersama sepertimana pertuduhan terhadap kedua-dua tertuduh (yang harus dibuktikan oleh pendakwaan) mahkamah ini telah menilai juga keterangan dan keadaan-keadaan yang menjuruskan sehingga keduanya tertangkap bersama dadah berkaitan. Seksyen 34 Kanun Keseksaan telah menggariskan situasi niat bersama ini:
>
> When a criminal act is done by several persons, in furtherance of common intention of all, each of such person is liable for that act in the same manner as if the act were done by him alone.
>
> Daripada keterangan-keterangan dalam kes ini, tangkapan terhadap kedua-dua tertuduh ini bermula dan pertemuan SP6 dengan tertuduh pertama untuk suatu urusan jual beli dadah di restoran berkenaan. Faktor ini disokong oleh SP7 yang mengesahkan berlakunya tawar menawar harga, yang akhirnya ditetapkan dan dipersetujui oleh tertuduh pertama. Selepas daripada itu tertuduh pertama telah bangun dan pergi ke hadapan kedai dan telah menelefon seseorang. Selepas 1–2 minit kemudiannya, dia datang semula ke meja di mana SP6 dan SP7 berada. tertuduh pertama kemudiannya telah mengajak SP6 dan SP7 pergi ke Flat Taman Pakatan, Bercham.
>
> Katanya lagi bekalan sudah ada dan kawannya sedang menunggu di flat tersebut. Dengan pandu arah oleh tertuduh pertama, mereka bertiga tertuduh pertama, SP6 dan SP7 telah berkereta dan berlepas ke sana, sampai di tempat kejadian, tertuduh pertama telah menunjukkan ke arah tertuduh kedua sedang menyandar — berdiri pada sebuah motosikal dengan membelakangkan jalan raya di situ. SP7 ada tanyakan kepada tertuduh pertama, 'mana barang?'; tertuduh jawab 'barang dalam beg' yang bermaksud barang berada di dalam beg yang digalas oleh tertuduh kedua.

Apabila SP7 membuka dan mengesahkan dadah di dalamnya kedua-dua tertuduh telah ditangkap di situ oleh pasukan menangkap polis.

Dengan mengambil kesemua keterangan dan keadaan-keadaan dalam kes ini telah menyebabkan suatu kesimpulan dapat dibuat oleh mahkamah ini bahawa terdapat satu rancangan terdahulu antara kedua-dua tertuduh. Tertuduh pertama jelas sebagai seorang yang berurusan dengan SP6 dan SP7 dan tertuduh kedua pula membawa keluar dadah bagi tujuan penghantaran dadah setelah diberitahu oleh tertuduh pertama. Jelas kedua-dua tertuduh mempunyai tujuan yang sama, iaitu untuk tujuan penjualan dan penghantaran bekal dadah kepada penyamar-penyamar sulit polis.

Dalam erti kata lain, walaupun kedua-dua tertuduh mempunyai peranan yang berlainan, tetapi di penghujung perbuatan mereka telah mencapai satu keputusan — untuk menyerahkan dadah yang dirancangkan. Mereka semestinya mempunyai niat bersama di dalam urusan tersebut sepertimana yang digariskan di bawah s 34 Kanun Keseksaan.

THE DEFENCE OF THE FIRST ACCUSED

[10] The first accused in his defence on oath testified that he came to Ipoh two weeks prior to the incident for the purpose of looking for a job. Whilst in Ipoh he squatted with a few of his friends who were also from Acheh, at Flat Lama Bercham. It was here that he got acquainted with a man by the name of 'Man'. 'Man', who used to frequent the Flat Lama Bercham, informed the first accused that SP6 could probably render some kind of assistance for him to get a job. On that basis he contacted SP6 hoping that SP6 could facilitate in his endeavour to get a job; but somehow things had turned out to be something else. According to the first accused when he first met SP6 it was at a restaurant not very far from Flat Lama Bercham. SP6 was with a friend whom SP6 introduced as 'Bob'. The first accused thought Bob was from a construction company. SP6 then requested the first accused to contact the second accused to ask the second accused to bring a bag belonging to Man that was left and kept at the second accused's place so that Man could collect it from him later. The first accused managed to contact the second accused and arrangement was made for the second accused to deliver the bag at the first accused's place at Flat Lama Bercham where the first accused and SP6 and SP6's friend SP7 would be waiting. The three of them then left the restaurant for Flat Lama Bercham to meet the second accused to collect the bag from him. They left in the car driven by Bob for Flat Lama Bercham. When they were about to arrive at the flat the first accused saw the second accused riding his motorcycle towards the same direction. The first accused waved and signalled the second accused to stop. Both vehicles stopped near a junction of the road leading to the flat. Bob got out of the car and hurriedly approached the second accused. The first accused who was seated at the rear passenger seat also alighted from the car intending to go towards the second accused. Before he could go further the first accused was ambushed by two Indian men who came on a motorcycle. The pillion rider

jumped on the first accused and pinned him to the ground. All of a sudden the first accused saw several men surrounding him and the second accused. The first accused inquired what the matter was, and was told 'di balai cakap'. The first accused was then blindfolded and taken to the balai.

[11] In his defence, the first accused denied making any offer to sell drugs to SP6 and SP7 at any time. He also denied any knowledge of the drugs that was recovered from the bag that was carried by the second accused.

[12] We do not propose to state and deal with the second accused's defence which resulted in him being acquitted and discharged by the learned trial judge. There is no necessity to do so as the appeal by the public prosecutor against the second accused acquittal order could not proceed due to the absence of the second accused before us.

THE APPEAL

[13] It was submitted before us that the central issue in this case is whether 'Man' was a fictitious invention of the first accused to deflect the charge or was his existence real? The trial judge, it was submitted had fallen into error in finding that the person 'Man' was a mere figment of the first accused's imagination invented for the purpose of the trial. To explain this proposition learned counsel put his argument as follows which we now reproduce:

> SUMBER, it is said gave SP6's mobile number to AGUS (Appellant) to call SP6.
>
> Appellant called the number given. Appellant says it was given by his friend MAN. Surely SUMBER would not have given his name as SUMBER to the appellant. And SUMBER had to have a name. What was the name?
>
> When appellant called SP6 he said that the number was given by MAN. Again, surely, it could not have been 'your SUMBER gave me the number'.
>
> No matter how the matter is looked at, the inescapable conclusion is that SUMBER is MAN and MAN is SUMBER. MAN is therefore not a fictitious person.
>
> Evidence was given that MAN spent some nights in the 2nd accused's house. There is therefore compelling reason to hold that the bag (P5A) stuffed with cannabis, was Man's.

[14] In response to the above argument, the learned DPP for the respondent drew this court's attention to the evidence of SP6 which read as follows:

> Saya tak pula mengenali mana-mana orang yang bernama 'Man' berkaitan dengan kes ini. 'Man' bukan nama sumber saya (dalam kes ini).

[15] In this connection, the DPP further submitted that there was nothing

in the evidence to suggest that SP6 had known the second accused prior to the incident. The second accused's own evidence made no mention about him knowing SP6 prior to that fateful date. This, according to the learned DPP negated the first accused's claim in his evidence that SP6 had asked the first accused to make a telephone call to the second accused to ask him to bring Man's bag that was left at the second accused's house and to be handed over to the first accused at Flat Lama Bercham. It was submitted further that the first accused's story with regard to the ownership of the bag, P5A, was a mere concoction. It follows that the suggestion that 'Man' was the owner of the bag P5A is untenable. It was submitted further that the evidence of SP6 supported the testimony of SP7 that on the evening of 2 May 2001 at the meeting in the restaurant, the first accused negotiated with SP6 on the sale of cannabis wherein the first accused finally agreed to sell 5kg of the drugs at a price of RM1,600 per kg.

DECISION

[16] The starting point of our evaluation of the first accused's appeal is whether the person by the name of 'Man' really existed, or could it be a mere figment of the first accused's imagination created for the purpose of this trial. If the answer to this is in the affirmative, the next question to be asked is whether the said 'Man' was the owner of the offending drugs in P5A. The trial judge in discerning this crucial issue in his judgment had this to say:

> Tertuduh pertama telah mengajukan pembelaannya dengan mengatakan yang tujuan dia berjumpa SP6 dan SP7 adalah sekadar pertemuan meminta pertolongan mendapatkan pekerjaan kepadanya melalui jasa baik SP6 dan SP7 setelah 'Man' (kononnya kawan tertuduh pertama) memaklumkannya SP6 boleh hulurkan pertolongan. Tetapi ujar tertuduh pertama, pertemuan itu telah bertukar kepada suatu suasana lain kemudiannya di mana katanya, SP6 telah seolah-olah memaksanya menghubungi tertuduh kedua membawa keluar beg 'Man' yang berada di rumah tertuduh kedua. Ujarnya lagi, tertuduh kedua telah membawa beg yang SP6 maksudkan itu ke Flat Lama Bercham. Tertuduh pertama dan kedua ditangkap di situ bersama-sama beg mengandungi dadah yang sedang digalas oleh tertuduh kedua di tempat kejadian.
>
> Semasa menjawab soalan-soalan timbalan pendakwa raya di sesi pemeriksaan balas, tertuduh pertama mengatakan yang dia baru dua minggu datang ke Ipoh dan masih tidak mempunyai pekerjaan. Dia hanya mempunyai taraf pelajaran setakat sekolah menengah rendah di Acheh, Indonesia. Masuk ke Malaysia melalui paspot dan mendapat pas lawatan sahaja.
>
> Kepada mahkamah alasan tujuan pertemuan tertuduh dengan SP6 bagi mendapat kerja (versi pembelaannya) boleh dikatakan sebagai suatu yang direka-reka olehnya. Ini kerana dari keterangannya sendiri, dia mengatakan bahawa dia baru sampai di Ipoh dan menumpang tinggal dan makan minum dengan kawan-kawan di Flat Bercham itu tanpa sebarang pekerjaan. Dia mengharapkan untuk bekerja tetapi masuknya ke Malaysia melalui pas lawatan sahaja dan dia tidak kemukakan apa-apa

permit untuk kerja. Lagi pun apalah yang dia beriya-iya sangat untuk bertemu dengan orang tempatan yang tidak dikenalinya bagi mencarikannya pekerjaan tanpa sebarang kelulusan atau kemahiran tertentu. Sedangkan kesemua kawan-kawannya termasuk tertuduh kedua sendiri pun bekerja di sektor pembinaan. Tertuduh pertama sendiri pun boleh ke tempat kerja kawan-kawannya bagi mendapatkan pekerjaan di sana. Mahkamah ini merasakan tertuduh pertama berbohong tentang tujuan sebenar pertemuannya dengan SP6 dan SP7 selepas mahkamah ini menerima keterangan kedua-dua SP6 dan SP7 tanpa sebarang keraguan dan mahkamah dibenarkan untuk menerima keseluruhan keterangan dan penyamar-penyamar sulit (agent provocateur) (sila rujuk s 40A Akta Dadah Berbahaya 1952).

Mahkamah ini merasakan yang tertuduh pertama juga telah berbohong dalam pembelaannya. Dia seolah-olah memberitahu bahawa walaupun SP6 mengenali 'Man' dan mengetahui tentang beg bersama dadah kepunyaan 'Man' tetapi masih juga memaksa, memerangkap dan menangkap tertuduh pertama dan kedua. Mahkamah ini tidak dapat menerima tentang berlakunya penganiayaan ke atas kedua-dua tertuduh ini oleh SP6. Ini kerana tidak ada sebab untuk SP6 dan SP7 berbuat demikian, lagi pun pihak-pihak dalam kes ini baru pertama kali berjumpa dan sudah semestinya tiada sebarang latar belakang dendam atau perselisihan antara mereka.

[17] It is clear from the above passage that although there was no specific finding by the trial judge as to the existence of the first accused's friend by the name of 'Man' whom the first accused alleged had given him SP6's mobile number, the judge had rejected the first accused's defence that 'Man' was the actual owner of the drugs in question, and that the second accused was an innocent carrier.

[18] We could find no reason to disagree with the trial judge. We would add that the evidence of SP6 established that the whole episode of the transaction started off when the first accused telephoned SP6 requesting SP6 to call the source who would then tell SP6 everything. By this, it was understood by SP6 that it must be about a drug transaction. Subsequent to that there were more calls from the first accused who wanted to meet SP6. Finally, they agreed to meet at a restaurant called Restoran Teman Anda. At the meeting SP6 was accompanied by a colleague, SP7. The three of them, after discussions, the first accused agreed to supply 5kg of ganja at a price of RM1,600 per kg.

[19] This evidence of SP6 was corroborated by SP7. In the cross-examination of SP6 it was put to him by learned counsel for the first accused that the discussions which the first accused had with SP6 was solely on the possibility of SP6 finding a job for the first accused and not about selling of drugs. With regard to this we are conscious of the trite principle of law that suggestions made to the prosecution's witnesses at the prosecution's stage by the defence are not evidence and remains mere suggestions — see *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 approving *Emperor v Karimuddi Sheikh* AIR 1932 Cal 373. Hence, we are of the view that what was put to the witness SP6 was just a proposition unsupported by evidence and successfully refuted by the prosecution.

[20] The other aspect of the defence story that need to be addressed is the suggestion by the first accused that his arrest together with the second accused and the finding of the incriminating drugs was a frame up. Having been put in a situation where the court was presented with two divergent versions of the episode leading to the arrest of the two accused and recovery of the offending drugs in question, the trial judge had apparently adopted the principle laid down by Thomson CJ in *Public Prosecutor v Mohamed Ali* [1962] MLJ 257. In that case the learned Chief Justice said:

> When a police witness says something that is not inherently impossible his evidence must be in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether police witness or not, who gives evidence on affirmation, should normally be accepted.

[21] Our appraisal of the aforesaid approach taken by the trial judge is further fortified by the following passage found in his judgment that read:

> Mahkamah ini merasakan yang tertuduh pertama juga telah berbohong dalam pembelaannya. Dia seolah-olah memberitahu bahawa walaupun SP6 mengenali 'Man' dan mengetahui tentang beg bersama dadah kepunyaan 'Man' tetapi masih juga memaksa, memerangkap dan menangkap tertuduh pertama dan kedua. Mahkamah ini tiada dapat menerima tentang berlakunya penganianyaan ke atas kedua-dua tertuduh ini oleh SP6. Ini kerana tidak ada sebab untuk SP6 dan SP7 berbuat demikian, lagi pun pihak-pihak dalam kes ini baru pertama kali berjumpa dan sudah semesti tiada sebarang latar belakang dendam atau perselisihan antara mereka.

[22] We are in agreement with the learned trial judge and we further of the view that in fact there is no evidence whatsoever at all of any reason or motive for the prosecution's witnesses aforesaid to frame up the first accused nor the second accused.

[23] Having dealt with the issue of divergence of factual versions of the prosecution's case and the defence story, there remain the issue of law to be addressed by this court. The starting point in the consideration of this issue is the question of possession. In *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 at p 639, it was said that:

> For the element of 'possession' … to be established it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to what he was carrying.

[24] Applying the factual matrix of this case on appeal before us, the irresistible inference that may be drawn on the proved facts was that the first accused all along was privy to the transaction of the sale of the drugs in question that was found in the beg slung on the body of the second accused at the time of the arrest. On the proven facts, we are also satisfied that the first accused had the requisite knowledge of the nature of the substance that he was dealing with. Hence, we agree with the learned trial judge that the first accused was in possession of the incriminating drugs, the subject matter of the charge.

[25] In this case the subject matter of the charge is cannabis weighing 4,934g which is well in excess of 200g. The learned trial judge had made a finding of fact that the first accused had the intention to sell and deliver the said drugs to SP6 and SP7, which he in fact delivered when he brought SP6 and SP7 to see the second accused. When SP7 asked him, 'mana barang?', the first accused pointed to the second accused and said, 'barang dalam beg'. The learned trial judge concluded that the first accused had not raised any reasonable doubt on the prosecution's case and that his defence was a mere denial.

[26] In *Public Prosecutor v Sa'ari Jusoh* [2007] 2 CLJ 197 the Federal Court at p 214 held:

> A sale is therefore complete upon transfer of the property in the goods even though the price has not been paid. A sale in this sense cannot therefore be described as an act preparatory to the sale or as negotiations leading to the sale or even as an agreement for a sale.

[27] The said case was referred to by this court in *Wan Marzuki Wan*

A *Abdullah v Public Prosecutor* [2008] 4 CLJ 631. Gopal Sri Ram JCA, in delivering the judgment of this court, at p 635 said:

> In our judgment whether there is actual delivery is a question of fact and of degree. It depends on the particular facts of an individual case. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an agent provocateur). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened in *Sa'ari Jusoh*. Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 when taken cumulatively constitute actual delivery.

[28] We agree with the finding of fact by the learned trial judge and his assessment of the first accused's defence. Thus, we hereby unanimously dismissed the first accused's appeal and affirmed the conviction and sentence passed by the trial judge.

Appeal dismissed.

Reported by Andrew Christopher Simon